IN THE SUPREME COURT OF THE UNITED STATES

AUG 13 1974

OCTOBER TERM, 1973

74-115

MARY STEWART POWELL, PETITIONER

vs.

WILLIAM K. ROGERS, Deputy Commissioner, United States Employees' Compensation, 13 Compensation District; STATE COMPENSATION INSURANCE FUND,

RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARY STEWART POWELL,
Appellant,

vs.

WILLIAM K. ROGERS, Deputy Commissioner, United States Employees' Compensation Commission, 13th Compensation District,
Appellee.

STATE COMPENSATION INSURANCE FUND,
Real Party in Interest-Appellee.

No. 72-2884

OPINION

[May 16, 1974]

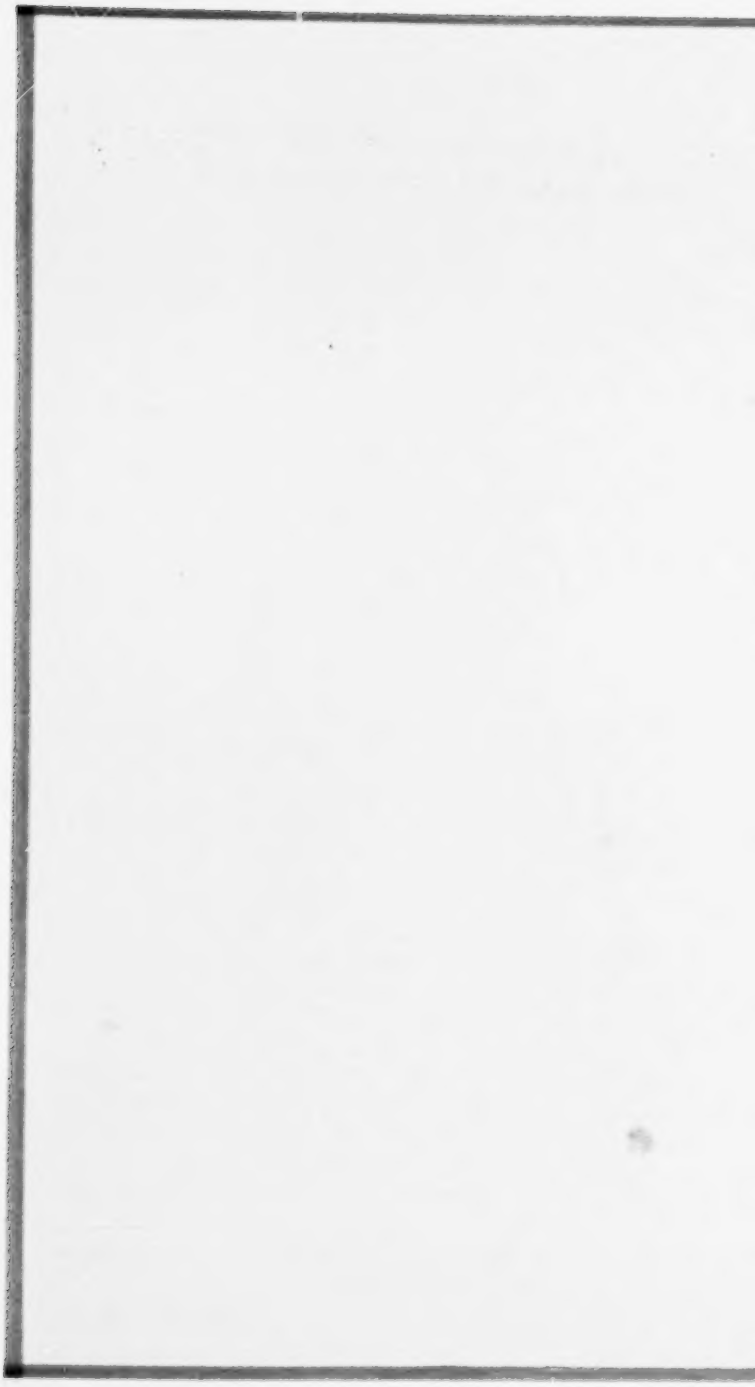
Appeal from the United States District Court
for the Northern District of California

Before: ELY and SNEED, Circuit Judges, and WILLIAMS,* District Judge.

SNEED, Circuit Judge:

The appellant, Ms. Mary Stewart Powell, brought this action pursuant to Section 21 of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, before the Compensation Commission for the 13th Compensation District, which denied the appellant's claim for death benefits under the above Act as the "surviving wife" or "widow" of Mr. Amadee B. Powell. In the district court the Deputy Commissioner and the State Compensation Insurance Fund, the real party in interest, moved for summary judgment dismissing the appellant's action. A motion for summary judgment setting aside the Deputy Commissioner's

*Honorable David W. Williams, United States District Judge, Central District of California, sitting by designation.



order and finding that the appellant was entitled to judgment on her claim as a matter of law was also filed. The appellant's motion was denied and that of the Deputy Commissioner and the State Insurance Board was granted. This appeal resulted. Our jurisdiction rests on 28 U.S.C. §1291, while that of the district court flows from 33 U.S.C. §901.

In large part because of the appellant's commendable candor, there is no dispute about the facts. She and the decedent, Mr. Amadee B. Powell, lived together from 1955 until his death in 1969 but did not undergo a formal or ceremonial marriage. Three children were born of this union, and the entire household was supported by the decedent. During most of this period the decedent was lawfully married to another, a marriage of which the appellant was aware. This marriage was dissolved by divorce in 1965, but there occurred no ceremonial marriage by the Powells thereafter. In the words of the appellant, her marriage was legal "[I]n the sight of God, yes; but in the sight of man, no."

The Deputy Commissioner found that the Powells lived together as man and wife in the States of California and Nevada, that death benefits should be paid on behalf of the three minor children to the appellant, their mother and natural guardian, but that no death benefits were payable to the appellant as a "surviving wife" or "widow". 33 U.S.C. §901(16), §909.

There is no escape from the conclusion that under these facts appellant was neither the lawful nor putative wife of the decedent under California or Nevada law. Lawful marriage requires the "issuance of a license and solemnization." Section 4100, California Civil Code. To be a putative spouse one must believe in good faith that he is a party to a valid marriage. *Vallera v. Vallera*, 21 Cal. 2d 681, 134 P.2d 761 (1943); *Miller v. Johnson*, 214 Cal. App. 123, 29 Cal. Rptr. 251 (1963); *Union Bank & Trust Co. v. Gordon*, 116 Cal. App. 2d 681, 254 P.2d 644 (1953); *In re Jackson's Estate*, 112 Cal. App. 2d 16, 245 P.2d 684 (1952). The appellant had no such belief. Her status was that of a common law wife under circumstances in which neither state with which the Powells had relevant contacts recognize a common law marriage. Sections 4100, 4213, California Civil Code; Section 122.010, Nevada Revised Statutes, Vol. IV. The issue before us is whether Ms. Mary Stewart Powell under these circumstances can be con-

sidered a "surviving wife" or "widow" under the Longshoreman's Harbor Workers' Compensation Act. We hold that she can not.

This Circuit has recognized, as it must, that the meaning of Sections 901(16) and 909 of the Act is a question of federal law. *Albina Engine and Machine Works v. O'Leary*, 328 F.2d 877 (9th Cir., 1964). However, this Circuit also has recognized that in the absence of a statutory definition of "surviving wife" or "widow" the applicable local law supplies the meaning of these terms. *Albina Engine and Machine Works v. O'Leary, supra; Bolin v. Marshall*, 76 F.2d 668 (9th Cir., 1935).

California law, while not recognizing the common law marriage, does employ the putative spouse doctrine generously. Thus, a putative wife is entitled to California workmen's compensation death benefits. *Neureither v. Workmen's Comp. App. Bd.*, 15 Cal. App. 3d 429, 93 Cal. Rptr. 162 (1971); *Brennfleck v. Workmen's Comp. App. Bd.*, 265 Cal. App. 2d 738, 71 Cal. Rptr. 525 (1968). Quite properly, the putative spouse doctrine has been employed to permit such a spouse to qualify as a "surviving wife" under the Act here before us. *Holland America Insurance Co. v. Rogers*, 313 F.Supp. 314 (D.C.N.D. Calif. 1970). However, no case in California or Nevada has been found in which a common law wife has been extended the protection of the applicable workmen's compensation act, unless the common law marriage was validly created in a state which recognizes such marriages. *Tatum v. Tatum*, 241 F.2d 401 (9th Cir., 1957).

California also recognizes that the putative spouse is entitled to take by intestacy on the death of his spouse in the same manner as a validly married spouse. *In re Krone's Estate*, 83 Cal. App. 2d 766, 189 P.2d 741 (1952); *Massenga v. Rosso*, 87 Cal. App. 2d 790, 197 P.2d 770 (1948). *In re Krone's Estate* has been used to allow a putative wife to bring an action for the wrongful death of her putative husband. *Kunakoff v. Woods*, 166 Cal. App. 2d 59, 332 P.2d 773 (1958). An agreement to pool earnings entered into by a putative spouse with the other member of the union has also been accorded the same protection that it would have received had there been a valid marriage. *Sancha v. Arnold*, 114 Cal. Rptr. 2d 772, 251 P.2d (1952).

In view of the failure of California and Nevada to recognize the common law marriage, and California's liberality in extend-

ing the equivalent of marital rights to a putative spouse, we are reluctant to depart from our practice of looking to the proper local law to provide the content of the terms "surviving wife" and "widow". To construe these terms to embrace the common law spouse to some extent would impose upon the residents of California and Nevada a form of marriage which they rejected in favor of, at least in the case of California, the putative spouse doctrine. It is in this manner that the necessary melioration of the requirements of a valid marriage is accomplished.[1]

It is urged upon us that both changing life styles and the cultural history of Blacks make necessary an interpretation of the Act that would recognize the rights of a surviving spouse of a common law marriage. This federal common law marriage, so to speak, would make uniform the application of the Act and eliminate from its administration the adventitious element of whether the law of a particular state recognized the common law marriage. These arguments are not without a certain appeal. We think, however, they more properly should be directed to Congress. Our view is strengthened by the fact that reliance on local law to supply the meaning of "surviving wife" and "widow" has existed since passage of the Act and Congress has not chosed to intervene. Whatever may be our desire to reform the law, it must be subordinate to our duty faithfully to interpret it in a reasonably consistent manner.

Finally, it has been suggested that the Supreme Court in *Thompson v. Lawson*, 347 U.S. 334 (1954) has instructed us to interpret the Act in the manner we are rejecting. In our view *Thompson v. Lawson* teaches no such lesson. The Court there was confronted with a claimant, deserted but not divorced by the

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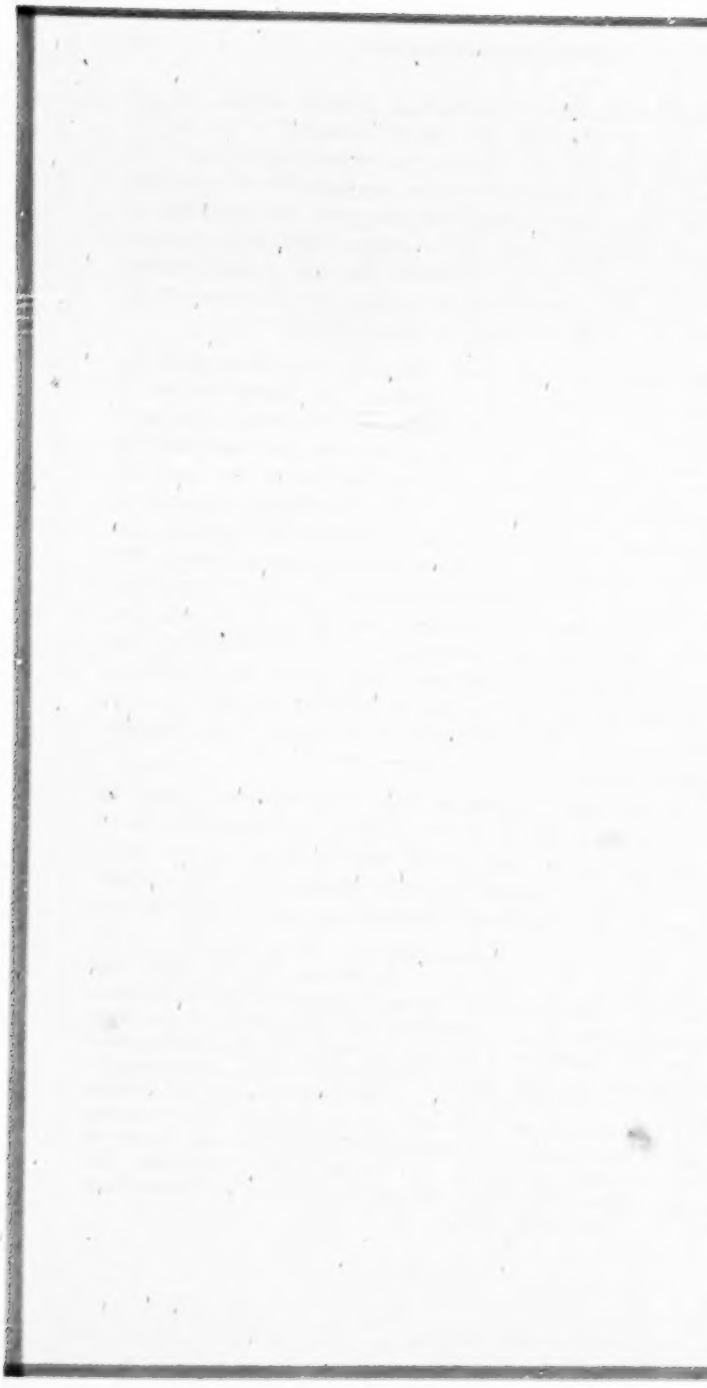
[1]In re Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Reptr. 862 (1973) holds that property acquired during "an actual family relationship, with cohabitation and mutual recognition and assumption of the usual rights, duties, and obligations attending marriage", in which both parties were aware that the marriage was not valid, is to be divided equally pursuant to §4800, Cal. Civ. Code. We are not prepared to accept this decision standing alone as recognition of the common law marriage by California.

For a general discussion of the status of California law with respect to the rights of a meretricious spouse, *see* Pinnolis, Illicit Cohabitation: The Impact of the Vallera and Keene Cases on the Rights of the Meretricious Spouse, 6 *U.C.D. L.Rev.* 354 (1973).



decedent, who had not lived with the decedent for 26 years prior to his death and who had "married" and "divorced" another during the intervening period. The issue was whether the claimant was a "widow" within the meaning of the Act, which is defined to include "only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart from justifiable cause or by reason of his desertion at such time," 33 U.S.C. §902(16). The Court resolved the issue against the claimant. She was neither living with, nor dependent for support upon, the decedent. Furthermore, she was not living apart "for justifiable cause or by reason of his desertion at such time." Her purported remarriage severed the "conjugal nexus" which the Act requires as the basis of her claim. 347 U.S. at 337. A deserted wife remains a deserted wife for the purposes of the Act only so long as she preserves the "conjugal nexus."

This holding can not be construed to mean that a common law marriage, as defined by federal law, is a "conjugal nexus" and that it alone is sufficient to qualify the claimant as a "surviving wife" or "widow". Such a meaning excessively extends the relatively narrow holding of the Supreme Court which, as a matter of fact, was designed to reject a holding of this Court which indicated that a claimant who was once a deserted wife remained one for the purposes of the Act although she had "remarried" another. 347 U.S. at 335. *See Moore Dry Dock Co. v. Pillsbury*, 169 F.2d 988 (9th Cir., 1948). It is for others to determine whether such an extension is desirable.

AFFIRMED.

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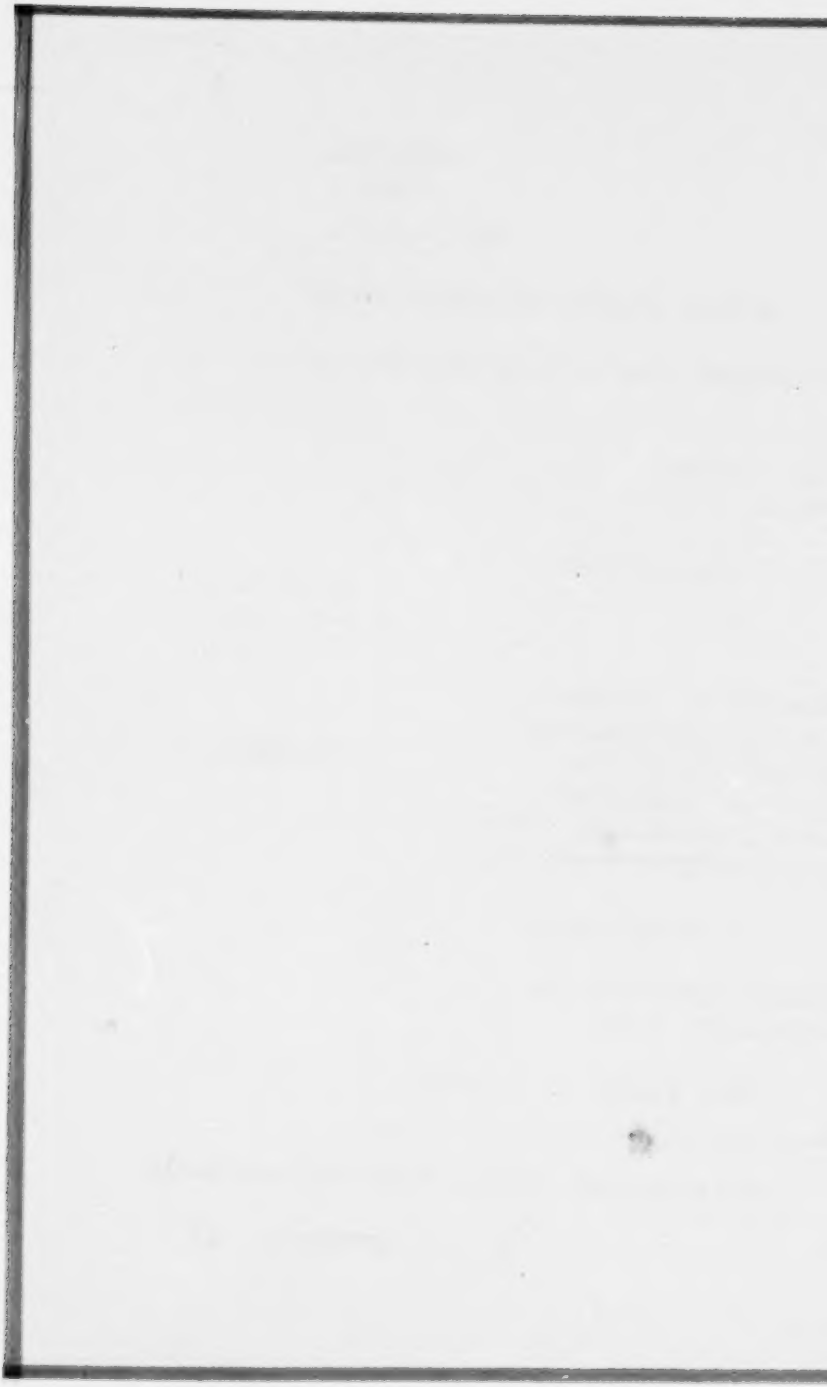
AUG 24 1972

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARY STEWART POWELL, Widow, Petitioner, v. WILLIAM K. ROGERS, Deputy Commissioner, United States Employees' Compensation Commission, 13th Compensation District, Respondent, STATE COMPENSATION INSURANCE FUND, Real Party in Interest.	CIVIL NO. C-71-358-SAW JUDGMENT

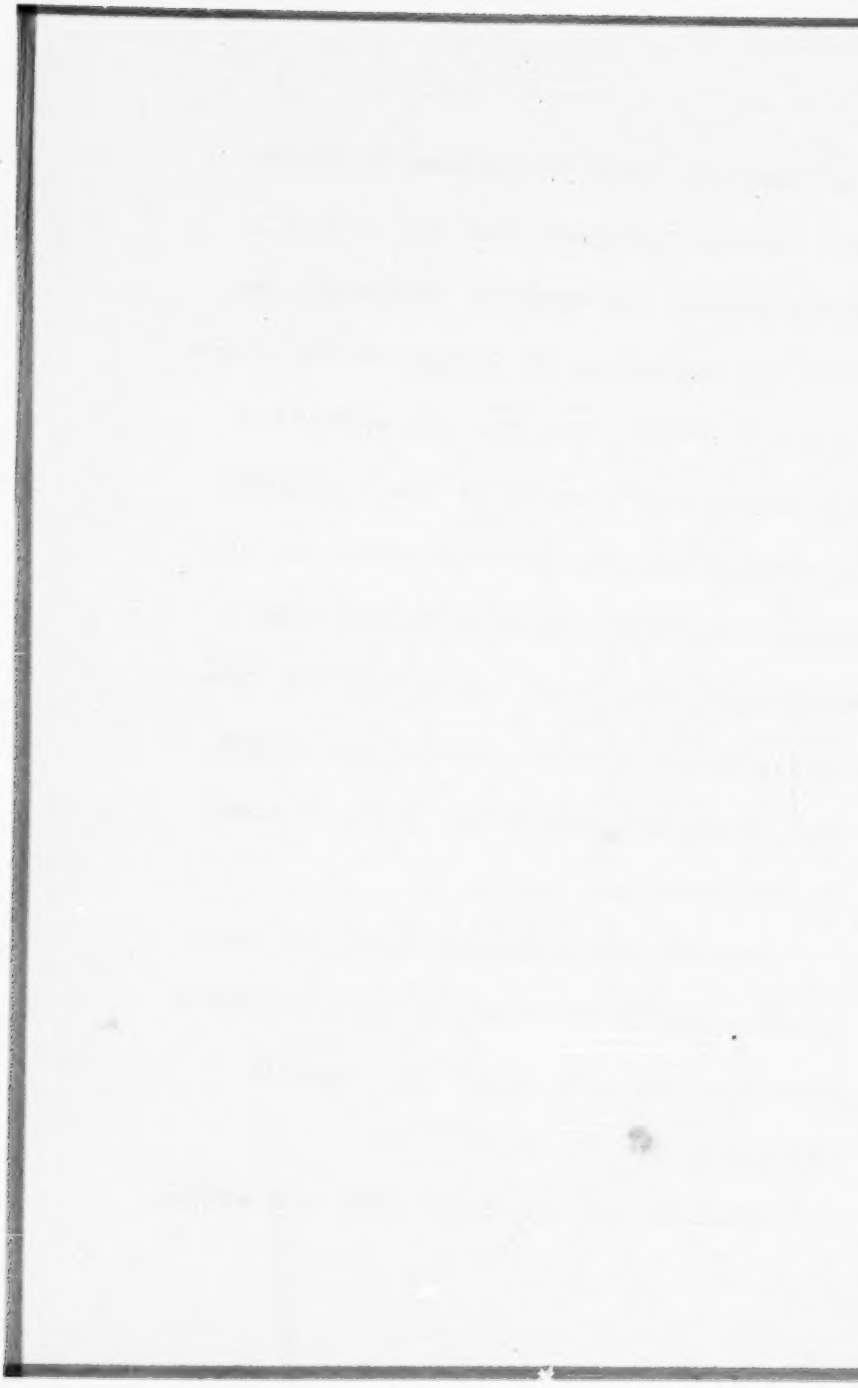
This matter having come on regularly



for hearing, upon Petitioner's motion for summary judgment and Respondent's cross motion for summary judgment, before the undersigned Judge of the above entitled court, the parties appearing and being represented by their counsel of record herein, and the court having duly considered the briefs and other memoranda submitted, including the administrative record, and having heard oral argument, and being fully advised in the premises, it is

ORDERED and ADJUDGED that the decision of the Respondent is in accordance with the law and is in all respects affirmed, and it is further

ORDERED and ADJUDGED that the action



is hereby dismissed on the merits.

DATED:

UNITED STATES DISTRICT JUDGE

Presented by:

JAMES L. BROWNING, JR.
United States Attorney

JOHN F. MEADOWS
Attorney in Charge,
West Coast Office
Admiralty and Shipping Section

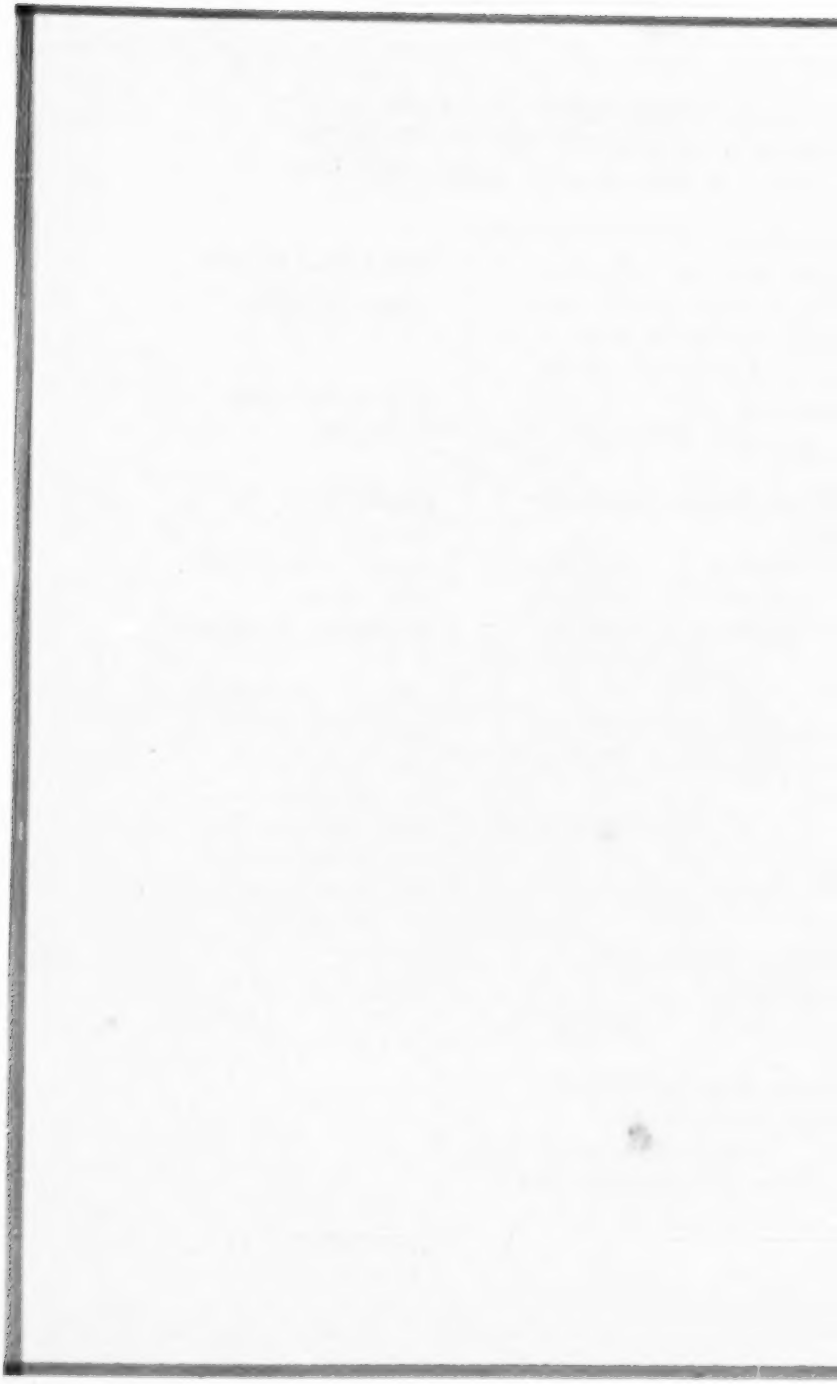
/s/ Robert J. Finan
ROBERT J. FINAN, Attorney
Admiralty and Shipping Section
U.S. Department of Justice

Attorneys for Respondent
William K. Rogers

U.S. DEPARTMENT OF LABOR
WORKPLACE STANDARDS ADMINISTRATION
Bureau of Employees' Compensation

In the matter of the proceedings under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901-50).	ORIGINAL FILED JAN 27 1971
MARY STEWART POWELL, Widow, and RODNEY D. POWELL, CEDRIC J. POWELL, TERRY D. POWELL, Minor Children of AMADEE B. POWELL, Deceased Employee, Claimants, - Versus - MARINE COOKS AND STEWARDS, Employer, STATE COMPENSATION INSURANCE FUND, Insurance Carrier.	COMPENSATION ORDER REJECTION OF CLAIM FOR DEATH BENEFITS FOR MARY STEWART POWELL AWARD OF DEATH BENEFITS FOR (1) Rodney D. Powell (2) Cedric J. Powell, (3) Terry D. Powell CASE NO. 13-14638

APPENDIX III



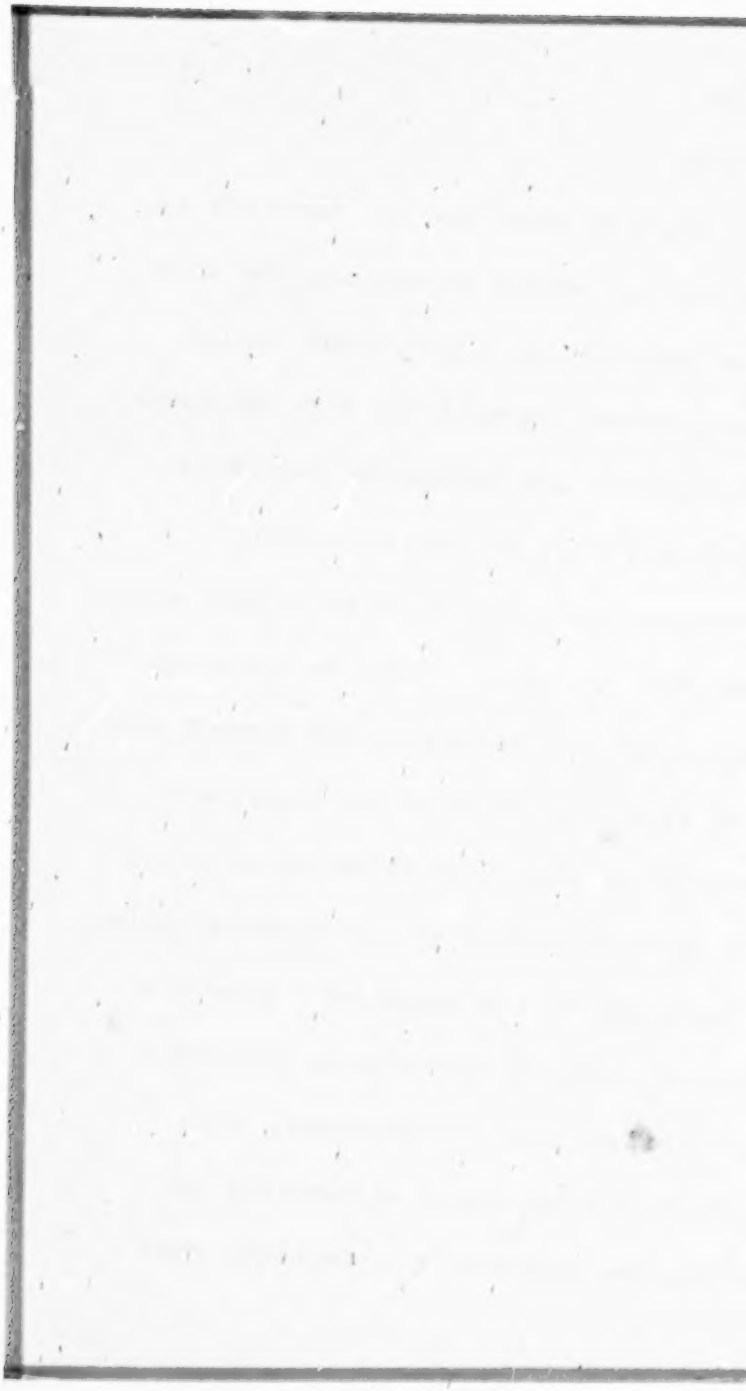
Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on the 23rd day of October 1969, the deceased employee above-named was in the employ of the employer above-named at San Francisco, in the State of California, in the Thirteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by the State Compensation Insur-

ance Fund;

2. That on said day the deceased employee herein, while performing services for the employer as a patrolman (union representative), aboard the S.S. Mariposa then afloat on the navigable waters of the United States at San Francisco, California, sustained a fatal injury when he was shot to death; that the deceased employee and his assailant had become involved in a dispute when the assailant attempted to form a maritime union which might have attracted as its members those who belonged to the deceased employee's employer; that in the dispute between the assailant and the decedent, such decedent was basically attempting to protect the employer's interests; that

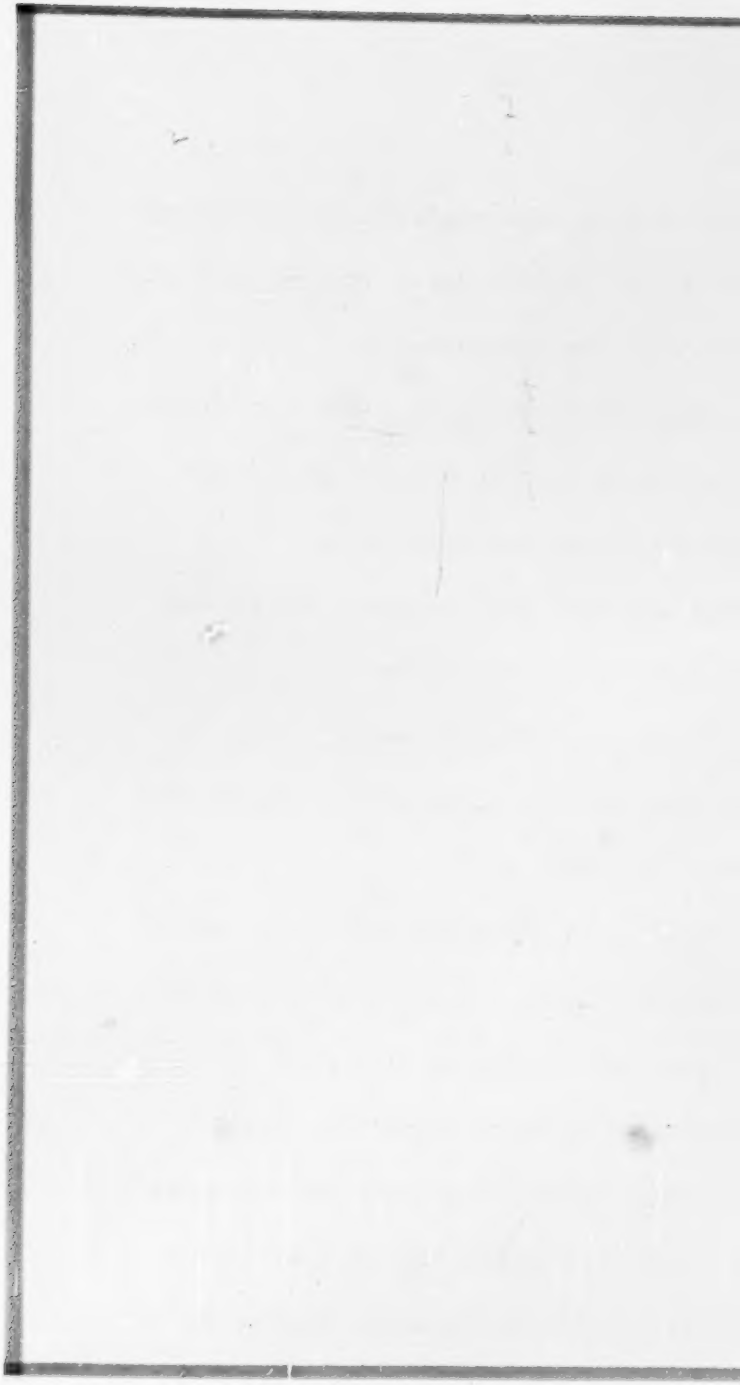


the fatal injury was employment connected; that the fatal injury arose out of and in the course of the employment;

3. That written notice was not given to the employer within thirty days, but that the employer had knowledge of the death and has not been prejudiced by the lack of such written notice;

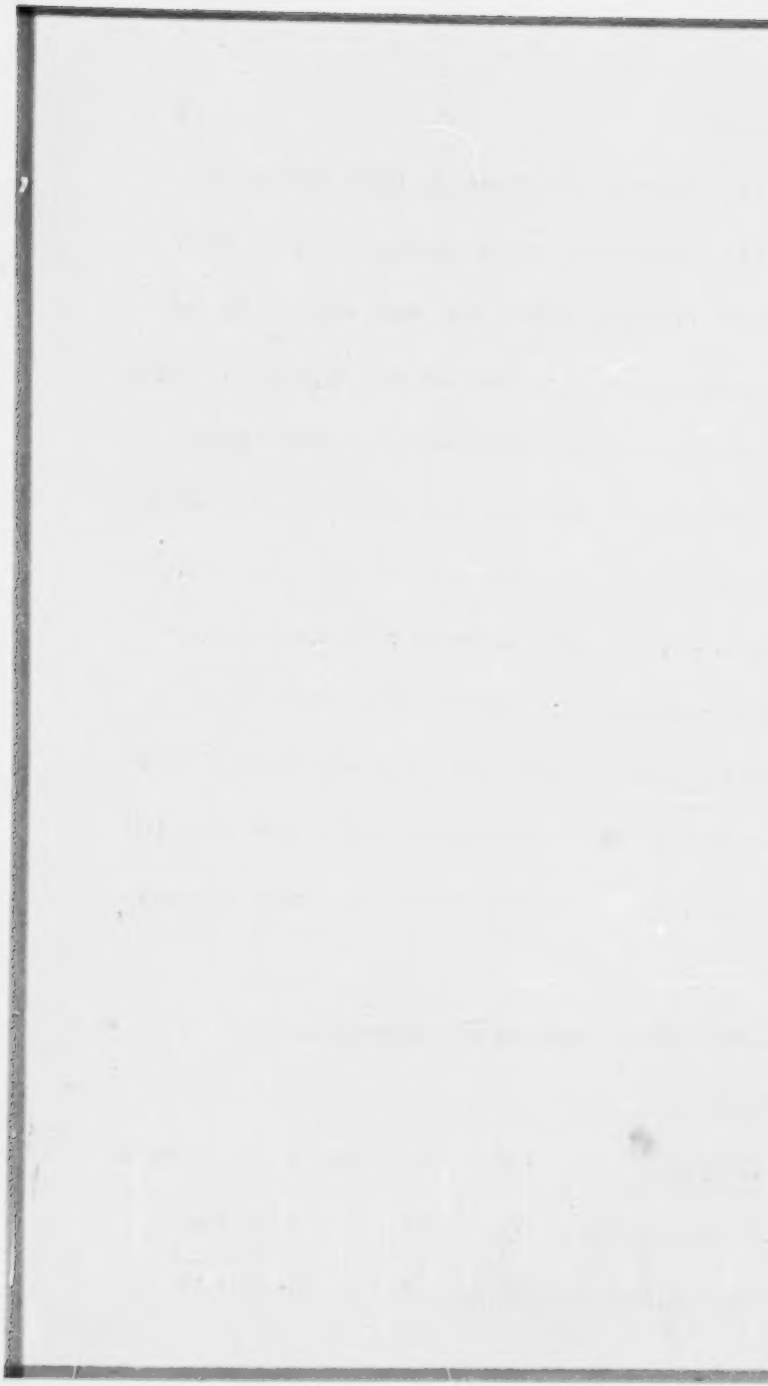
4. That the average weekly wage of the employee at the time of his death was in excess of $105;

5. That the deceased employee and Mary Stewart Powell began living together in the same household in the year 1955, and continued to live together in such relationship to the time of the employee's death; that from their union there were born three children



Powell, Cedric J. Powell, and Terry D. Powell; that the said employee and Mary Stewart Powell lived as man and wife in the states of California and Nevada; that the said parties were not ceremonially married; that during the period the said parties lived as man and wife, the states of California and Nevada did not recognize a common law marriage; that Mary Stewart Powell was not the surviving wife or widow of the deceased employee within the meaning of such terms as they appear in the said Act;

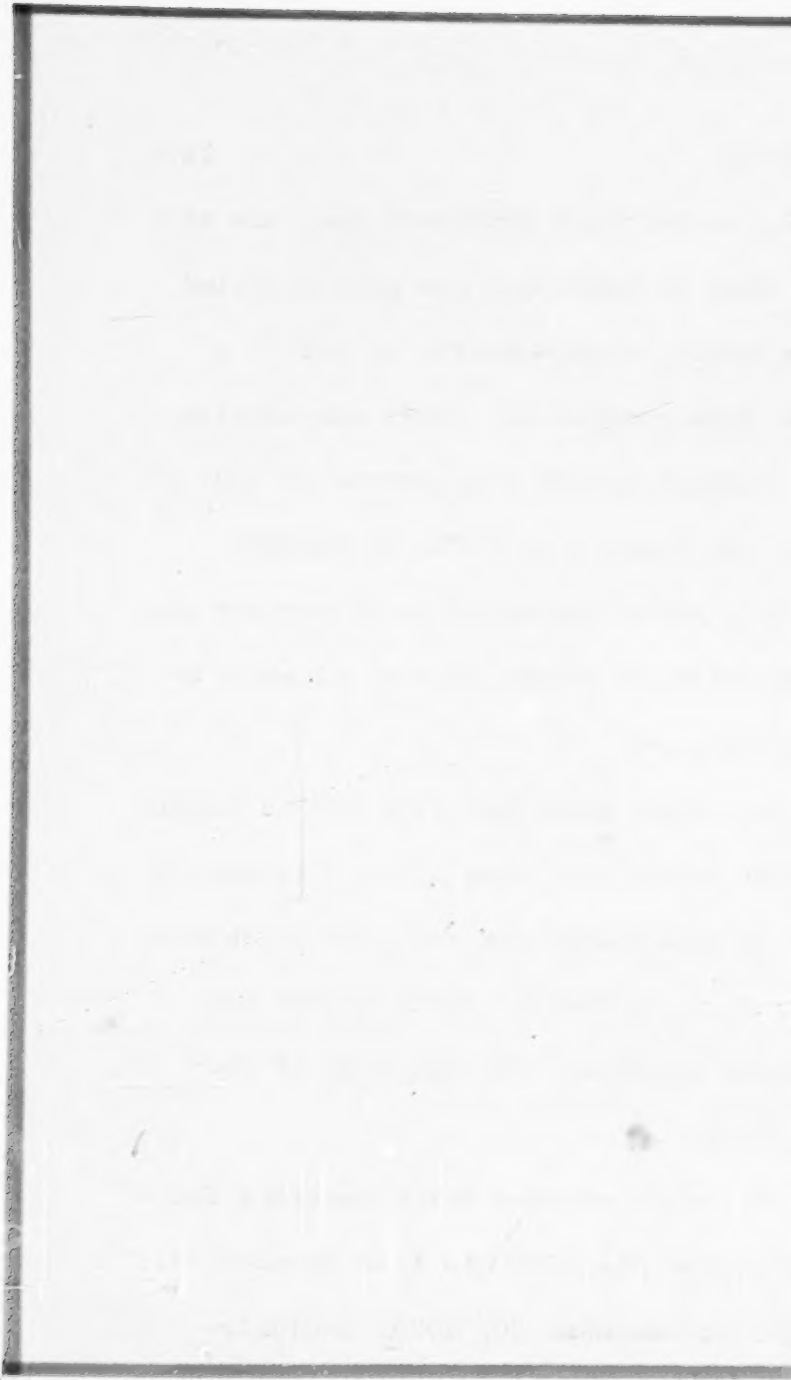
6. That Rodney D. Powell, born on August 11, 1956, Cedric J. Powell, born on December 18, 1958, and Terry D. Powell, born on January 19, 1962, are the surviving minor children of the deceased



employee and were dependent upon him at the time of death and are each entitled to a weekly death benefit of $22.75 a week from October 24, 1969, and continuing subject to the limitations of the Act, (65 percent of $105; 35 percent for one child increased by 15 percent for each child in excess of one) payable in equal shares;

7. That death benefits due in behalf of the three surviving minor children of the deceased employee shall be payable to Mary Stewart Powell, their mother and natural guardian, as custodian of such children;

8. That accrued death benefits for each minor child herein from October 24, 1969, to December 30, 1970, inclusive



(date of last hearing), 61-6/7 weeks at $22.75 a week amount to $1,407.25; that accrued death benefits payable in behalf of the three minor children at the combined rate of $68.25 a week, covering the aforesaid period (61-6/7 weeks) amount to $4,221.75;

9. That the employer and insurance carrier have paid the statutory limitation of $400 as reasonable funeral expenses;

10. That the employer and insurance carrier have voluntarily paid death benefits in the combined amount of $1,638 in behalf of the three minor children herein.

Upon the foregoing findings of fact it is ORDERED that the claim for death

benefits filed by Mary Stewart Powell on behalf of herself be and it is hereby REJECTED for the following reason:

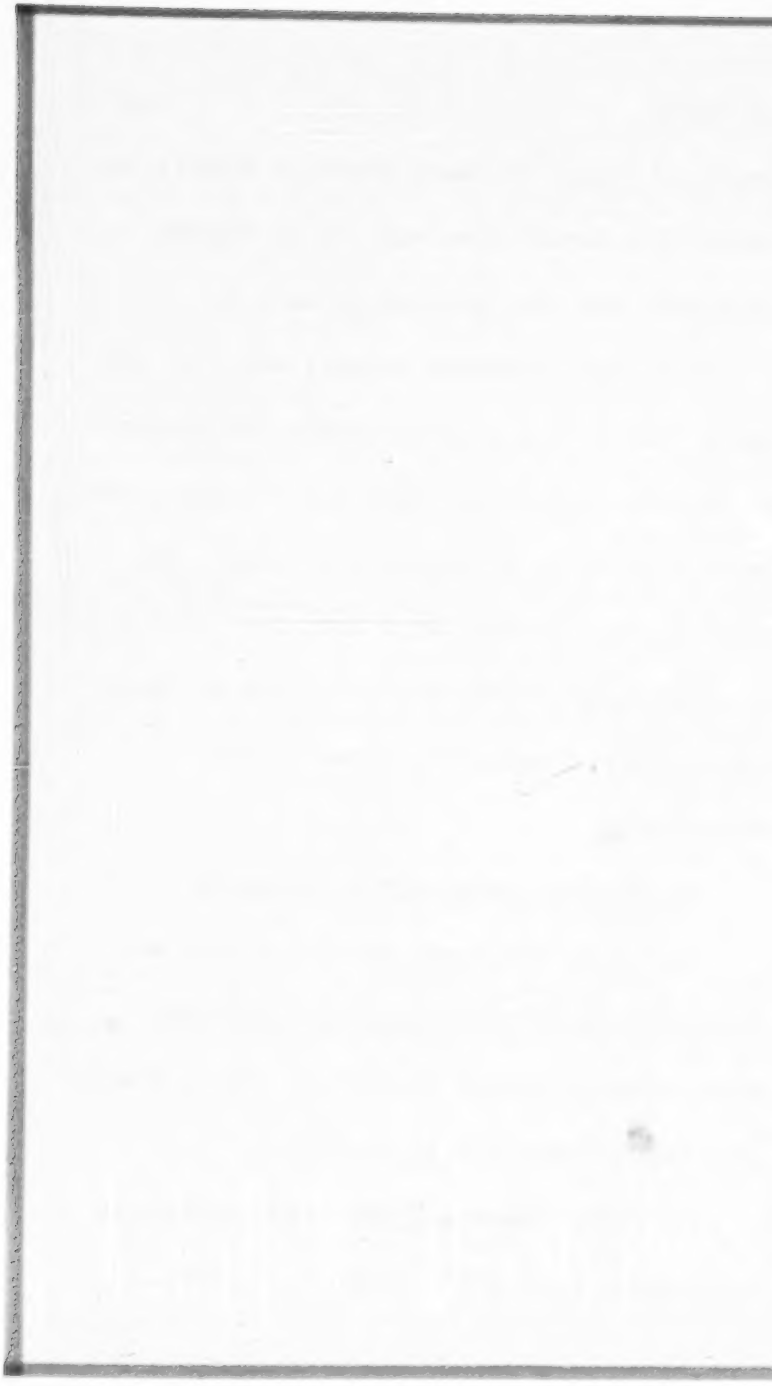
That Mary Stewart Powell was not the legal surviving wife or widow of Amadee B. Powell within the meaning of the terms, surviving wife or surviving widow, as they appear in the said Act.

Upon the foregoing findings of fact the Deputy Commissioner makes the following:

AWARD FOR THREE MINOR CHILDREN

That the employer Marine Cooks and Stewards, and the insurance carrier, State Compensation Insurance Fund, shall pay death benefits as follows:

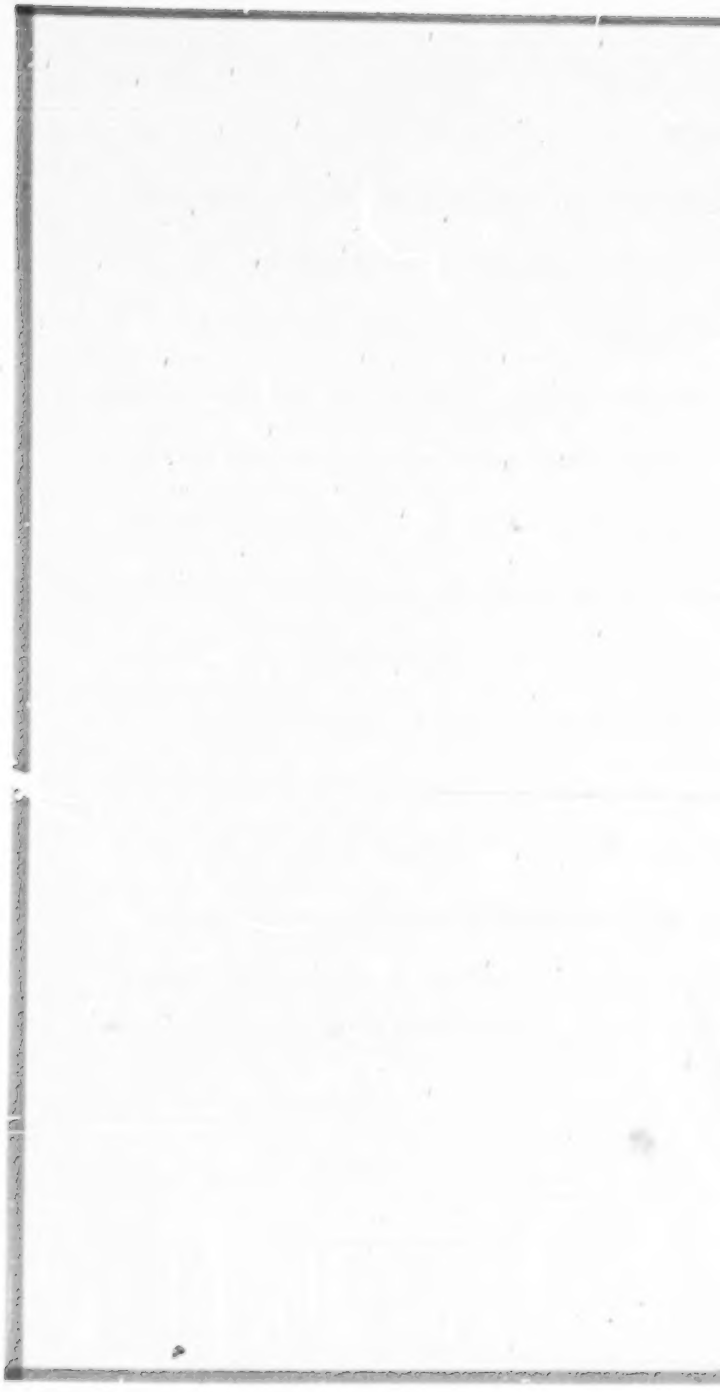
To Mary Stewart Powell as custodian of Rodney D. Powell, Cedriv J. Powell,



and Terry D.Powell, 61-6/7 weeks at the combined rate of $68.25 a week for the three minors, in the amount of $4,221.75, covering the period from October 24, 1969, to December 30, 1970, inclusive; the employer and insurance carrier having already paid $1,638 as death benefits, there is due the sum of $2,583.75, which is to be paid forthwith, together with interest payable in accordance with Section 14(b) and (m) of the Act, 33 U.S.C. 914 (b) and (m) on each past due instalment of compensation at the rate of 6 percent per annum from its original due date until paid. Payments at the combined rate of $68.25 a week are to continue from December 31, 1970, in biweekly instalments subject to the

limitations of the Act or until further order of the Deputy Commissioner.

If payment is not made within 10 days of the dates specified in this order, additional compensation for delay shall be paid at the rate of 20 percent in accordance with Section 14(f) of the Act, 33 U.S.C. 914(f). If default in payment continues over 30 days, application should be made to the Deputy Commissioner within one year after such default for a supplementary order for enforcement of this award by the federal court



in accordance with Section 18(a) of the Act, 33 U.S.C. 918(a).

Given under my hand and filed at San Francisco, California, this 27th day of January, 1971.

/s/ William K. Rogers

WILLIAM K. ROGERS
Deputy Commissioner
13th Compensation District